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IN THE

Supreme Court of the United States

October Term, 1966

No. 747

SHERIDAN CREATIONS, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Statement of Jurisdiction	2
Questions Presented for Review	2
Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
1. The case involves two important and fundamental questions of Federal Labor Law which should be, but have not been, settled by the Supreme Court	7
2. The majority decision renders the law uncertain and unclear and is in conflict with the decisions of this Court and other decisions	8
3. The majority decision of the Court of Appeals is in conflict with the clearly stated purpose of the National Labor Relations Act	9
4. The majority of the Court of Appeals improperly and mechanically applied a rule originally designed for a different set of facts	12
5. The majority of the Court of Appeals erred in its construction of Section 8(a)(5) of the National Labor Relations Act	15

PAGE

6. The majority of the Court of Appeals erred in making an assumption of fact as to a matter which was in issue where both the Trial Examiner and the National Labor Relations Board specifically and intentionally refrained from making a finding, and when that issue of fact was never presented to, discussed or argued before the Court of Appeals 16

Conclusion 17

Appendix A—Statute Involved 1a

Appendix B—Opinion of Court of Appeals 1b

Decree of Court of Appeals 9b

Citations

Cases:

Edward Fields, Inc. v. N.L.R.B., 325 F. 2d 754 (C. A. 2, 1963) 13

International Ladies' Garment Workers Union v. N.L.R.B., 366 U. S. 731 (1961) 8, 12

Moscow Idaho Seed Co., 107 NLRB 107 9

N.L.R.B. v. Local 210, International Brotherhood of Teamsters, 330 F. 2d 46 (C. A. 2, 1964) 8

N.L.R.B. v. Red Arrow Freight Lines, 193 F. 2d 979 (C. A. 5, 1952) 11

N.L.R.B. v. Trosch, 321 F. 2d 692 (C. A. 4, 1963), cert. den. 375 U. S. 993 11

PAGE

CASES (cont'd):

Retail Associates, Inc., 120 NLRB 388 ..... 13, 14

Universal Insulation Corporation v. N.L.R.B., 361 F. 2d 406 (C. A. 6, 1966) 13

STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sec. 151, *et seq.*):

29 U. S. C. Section 157 9

29 U. S. C. Section 158(a)(1) 9, 10

29 U. S. C. Section 158(a)(2) 9, 12

29 U. S. C. Section 158(a)(5) 7, 15, 16

29 U. S. C. Section 158 (b)(1)(A) 10

29 U. S. C. Section 159(a) 15

29 U. S. C. Section 159(b) 10

MISCELLANEOUS:

Committee of Conference of the Congress of the United States

H. R. Rep. No. 510, 80th Cong., 1st Sess. 1153 10

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that a writ of certiorari be issued to review a decree of the United States Court of Appeals for the Second Circuit entered in the above entitled matter on June 8, 1966.

Opinions Below

The majority opinion of the United States Court of Appeals for the Second Circuit is reported at 357 F. 2d 245.

The dissenting opinion of the Chief Judge of the United

States Court of Appeals for the Second Circuit is reported at 357 F. 2d 248.

The decision of the National Labor Relations Board rejecting the recommendation of the Trial Examiner is reported at 149 NLRB 1503.

The Intermediate Report of the Trial Examiner is reported at 149 NLRB 1509.

Statement of Jurisdiction

The decree of the Court of Appeals was made and entered on June 8, 1966. An order of this Court dated September 9, 1966 extended petitioner's time to and including November 5, 1966 in which to petition for a writ of certiorari. The jurisdiction of this Court is conferred by 28 U. S. C. Sec. 1254(1). The jurisdiction of the Court of Appeals is found in 29 U. S. C. Sec. 160(e).

Questions Presented for Review

1. Did a majority of the Court of Appeals err in adopting a per se rule which permits an employer and a union to join in disregarding the representational desires of the employer's employees and which compels the employer to disregard the choice of his employees, even though notified thereof months beforehand, once negotiations have commenced between a multi-employer association of which he is a member and the union which does not represent his employees?

2. Where Section 8(a)(5) of the National Labor Relations Act reads "It shall be an unfair labor practice for an

employer to refuse to bargain collectively with the representatives of his employees . . .", did a majority of the Court of Appeals err in construing the words "his employees" to refer not to the employees of the employer charged with the unfair labor practice, but to all of the employees of all the employers in a multi-employer association?

3. Did a majority of the Court of Appeals err in making an assumption of fact as to a matter which was in issue where both the Trial Examiner and the National Labor Relations Board specifically and intentionally refrained from making a finding, and when that issue of fact was never presented to, discussed or argued before the Court of Appeals?

Statute Involved

The complaint charged the employer with a violation of Section 8(a)(5) and, derivatively, of Section 8(a)(1) of the National Labor Relations Act (61 Stat. 136, 29 U. S. C. 158(a)(5) and 29 U. S. C. 158(a)(1)).

However, the issues raised involve these additional statutory provisions:

> 61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sections 152(2), 152(3), 157, 158(a)(2), 158(b)(1)(A), 159(a) and 159(b).

The provisions of the statute involved are printed in Appendix A.

Statement of the Case

In 1959, Sheridan Creations, Inc. (Sheridan, petitioner employer), entered into a collective bargaining agreement with a union (R. 157-158).[1] The agreement covered certain employees of the petitioner in an employer-wide unit, a unit admittedly appropriate (R. 129 ¶s 5, 6).

Thereafter, in 1960, Sheridan became a member of an employer's association and thereby part of multi-employer unit. (R. 92-130). The NLRB did not participate in any way in the determination of this unit (R. 110-111). There has never been any interchange of employees between Sheridan and any other member of the association (R. 102-103). Sheridan provides permanent, not transient, employment (R. 102-103).

In 1961 Sheridan, in conjunction with the association, entered into a collective bargaining agreement with the union for a period terminating on April 30, 1963 (R. 139-141). The contract included a union shop clause and covered four employees of Sheridan (R. 162b).[2] In the latter part of 1962 Sheridan was notified by its employees that three of the four employees in the unit covered by the collective bargaining agreement no longer wanted to be members of the union (R. 96-97, 112, 162b).

The union in this case does not claim to represent a majority of the employer's employees. It made no such claim in its unfair labor practice charge (R. 119-120). It made no such claim at the hearing. The complaint of the

[1] References designated "R" are to the record which is set forth in the Joint Appendix prepared for the Court of Appeals.

[2] General Counsel's Exhibit 17 is not page numbered in the Joint Appendix. The page immediately preceding it is page 162. The four pages of that exhibit will be referred to as 162a-162d herein.

NLRB nowhere alleges that the union represents a majority of the employer's employees (R. 121-126).

In the latter part of 1962, and thereafter on a number of occasions, Sheridan contacted the attorney for the association and notified him that its employees no longer wished to be represented by the union (R. 112-113). Sheridan was advised by that attorney that it could do nothing about the matter "until the contract is up. You signed a contract" (R. 113).

In March 1963 the employees again contacted Sheridan's Secretary-Treasurer and again stated that they wanted "to get out of the Union" (R. 97, 162b). Sheridan then contacted its own attorney who retained special labor counsel. A petition for a representation election was filed by Sheridan with the NLRB in March 1963 (R. 130).

Shortly after the filing of this first representation petition Sheridan's special labor counsel learned of the association (R. 114) and a letter of withdrawal from the association was immediately prepared and mailed to the association (R. 114, 143) A copy was forwarded to the union (R. 63-64). The union also received a copy of Sheridan's petition for a representation election (R. 64).

Sheridan filed additional petitions for a representation election (R. 130, 131) but no election was ever held. A representation election was opposed by the union and representation proceedings were interrupted by the filing of the union's unfair labor practice charge.

Two collective bargaining sessions between representatives of the association and the union were held in March 1963 prior to the filing of Sheridan's first representation petition. An issue of fact was raised as to whether a re-

presentative of the petitioner attended any bargaining session prior to the filing of the petition. Neither the Trial Examiner nor the NLRB found the resolution of that issue necessary to their decisions and specifically declined to make a finding (R. 4, ftnt. 4; R. 20, ftnt. 5), but a majority of the Court of Appeals assumed that the employer's representative was present at the first two bargaining sessions (357 F. 2d 247, Appendix B, p. 1b). Bargaining between the association and the union was concluded 34 days after the representation petition was filed. The bargaining was not disturbed by the petitioner's withdrawal from the association. (357 F. 2d 250, Appendix B, p. 7b).

On the day prior to a scheduled hearing on the petition for a representation election the union charged Sheridan with trying to induce its employees to desert the union and with refusal to bargain with the union (R. 119-120). The NLRB investigated the charge, questioned the employees, and declined to issue a complaint charging the employer with any misconduct except a refusal to bargain (R. 163). There is no evidence of any anti-union animus on the part of the employer.

The Trial Examiner, who observed all the witnesses, specifically found that the employer acted in good faith. (R. 24-27).

REASONS FOR GRANTING THE WRIT

The case involves two important and fundamental questions of Federal Labor Law which should be, but have not been, settled by the Supreme Court.

The questions in this case relate to fundamental labor policies of the United States and arise in the context of multi-employer bargaining, an increasingly important area of labor-management relations.

One of the questions involves the balancing of the interest of the administrative convenience of the NLRB and the possibility of disturbing the stability of the bargaining process (there was no disturbance in this case), against the right of employees to be free from compulsory "representation" by a union which is not, in fact, their representative, and the right of an employer to refrain from becoming party to a collective bargaining agreement with a union which does not represent his employees.

So far as counsel and the Court of Appeals could determine, this is the first case in which either the NLRB or a court of law has ordered an employer who is free of anti-union animus and who has not violated any of the first four sub-sections of Section 8(a) of the National Labor Relations Act (Act) to recognize and enter into a collective bargaining agreement with an uncertified union which does not represent a majority of his employees.

The other question involves a novel construction of Section 8(a)(5) of the National Labor Relations Act. Section 8(a)(5) reads:

> "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the

representatives of his employees, subject to the provisions of section 9(a)."

The majority decision below construes the words "his employees" in Section 8(a)(5) to refer not to the employees of the employer who is charged with the refusal to bargain, but to the employees of all the employers in a multi-employer unit. No citation of statute, no prior decision, no legislative history is given for this novel construction which is at variance with the clear meaning of the words. It is upon this construction of the law that the majority of the Court of Appeals rested its decision requiring the employer to bargain with a union which did not represent his employees.

The majority decision renders the law uncertain and unclear and is in conflict with the decisions of this Court and other decisions.

Chief Judge Lumbard, in his dissent, notes that the majority decision enforces a rule which "conflicts with the policy so forcefully expressed in *International Ladies' Garment Workers Union* v. *N.L.R.B.*, 366 U. S. 731 (1961) that an employer should not bargain with an unrepresentative union." (357 F. 2d 250, Appendix B, p. 8b).

The decision appealed from also conflicts with the decision in *N.L.R.B.* v. *Local 210, I.B.T.*, 330 F. 2d 46 (C. A. 2, 1964), wherein the Court of Appeals held that it is an unfair labor practice for an employer to become a member of a multi-employer association when his employees are not represented by a labor organization and then to become party to an association-union collective bargaining agreement recognizing a union as their representative. In the instant case a majority of that same court has decided that

it is not an unfair labor practice for an employer to remain a member of a multi-employer association when his employees are not represented by a labor organization and then to become party to an association-union agreement recognizing a union as their representative.

In this case the NLRB not only rejected the recommendation of the Trial Examiner, but also failed to take note of *Moscow Idaho Seed Co.*, 107 NLRB 107. The NLRB decision in this case conflicts with its decision in *Moscow Idaho Seed Co., supra.*

The majority decision of the Court of Appeals is in conflict with the clearly stated purpose of the National Labor Relations Act.

This is a case out of Kafka.

The NLRB, which is specifically charged by the Act with protecting the rights of employees to select "representatives of their own choosing" wholly ignored the rights of Sheridan's employees (29 U. S. C. Sec. 157).

Sheridan, which is specifically enjoined by the Act to refrain from recognizing and bargaining with a union which does not represent a majority of its employees (29 U. S. C. Sections 158(a)(1), 158(a)(2)) is, in this case, ordered by a majority of the Court of Appeals to do what the Act specifically forbids.

The purposes of the Act are, of course, best expressed in its language. Section 7 (29 U. S. C. Sec. 157) gives "employees . . . the right to *self*-organization, . . . to bargain collectively through representatives of their own choosing, and . . . to refrain from all such activities. . . ."

(Emphasis added.) This purpose is protected by section 8(a)(1) (29 U. S. C. Sec. 158(a)(1) which makes it "an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7", and by section 8(b)(1)(A) (29 U. S. C. Section 158(b)(1)(A)) which makes it "an unfair labor practice for a labor organization or its agents to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7. . . ."

Section 9(b) of the Act (29 U. S. C. 159(b)) in material part reads: "The Board shall decide in each case whether, *in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act,* the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . .". (Emphasis added.)

A further expression of Congressional intent is found in the report of the Committee of Conference of the Congress of the United States concerning the Labor-Management Relations Act, 1947 which amended Sections 7 and 9(b) of the Act among others. That report reads in part:

> "It must be emphasized that one of the principal purposes of the National Labor Relations Act is to give employees full freedom to choose or not to choose representatives for collective bargaining. As has already been pointed out in the discussion of section 7, the conference agreement guarantees in express terms the right of employees to refrain from collective bargaining or concerted activities if they choose to do so. This additional guaranty—recognizing and protecting, as it does, the rights and interests of individuals and minorities—will, it is believed, through wise administration result in a

> substantially larger measure of protection of those rights when bargaining units are being established than has heretofore been the practice." H.R. Rep. No. 510, 80th Cong., 1st Sess. 1153 (1947).

This national policy has been recognized and clearly stated by the Courts. For example, in *N. L. R. B.* v. *Red Arrow Freight Lines,* 193 F. 2d 979 (C. A. 5, 1952) the Court wrote at page 981:

> "This court has taken the unwavering position, under the act, both in its original form and as amended, that what the statute was enacted to accomplish was to protect not the rights of unions to obtain representation contracts but the rights of employees to be represented by a bargaining agent of their own choosing, and that, under all circumstances, these rights must be protected and preserved."
>
> "It is equally well settled, though, that employees may not be prevented by the order of the board or of this court from fairly and without interference, inducement, or coercion, choosing their own representative."

Thus, the cases require an employer to make reasonable efforts to determine if the union which seeks recognition does, in fact, represent a majority of his employees. *N. L. R. B.* v. *Trosch,* 321 F. 2d 692 (C. A. 4, 1963), cert. den. 375 U. S. 993.

This Court has set aside a collective bargaining agreement where the union did not represent a majority of the employees of the employer at the time the agreement was made even though the employer had acted in good faith and even though the union thereafter gained a majority.

International Ladies' Garment Workers Union v. *N. L. R. B.*, 366 U. S. 731 (1961). In doing so, this Court wrote at pages 738-739:

> "To countenance such an excuse [the employer's good faith] would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives."

The danger perceived by this Court in *ILGWU* v. *N. L. R. B., supra,* is present in this case. A careless employer (Sheridan) although notified by his employees that the union no longer represented them, failed to withdraw from a multi-employer association until after negotiations between the association and the union had commenced.

However, the majority of the Court of Appeals in this case, instead of following *ILGWU* v. *N. L. R. B., supra,* and protecting the rights of the employees, subordinated those rights to the administrative convenience of the NLRB and the possibility that, in other instances, withdrawal by an employer under the circumstances of this case might result in disrupting the bargaining process.

The majority of the Court of Appeals improperly and mechanically applied a rule originally designed for a different set of facts.

The effect of the Court of Appeals decision is that where an employer fails to meet his obligation under Section 8(a)(2) of the Act to refrain from recognizing and dealing with a non-representative union before nego-

tiations begin, not only does that obligation cease, but the employees of that employer lose their rights to be free from "representation" by a union which does not, in fact, represent them, and the employer acquires a reverse obligation: he is now compelled to recognize the non-representative union and become party to the agreement which is thereafter reached between that union and the association from which he has withdrawn.

This result follows from the same "wooden" application of a rule designed for a different set of facts as was criticized in *Edward Fields, Inc.* v. *N. L. R. B.*, 325 F. 2d 754, 760 (C. A. 2, 1963).

Although some NLRB decisions are cited by the majority as points of reference, they are distinguished in the dissent (357 F. 2d 249-250, Appendix B, pp. 5b-7b). Not one of the cases cited by the Court of Appeals or by the NLRB dealt with a non-representative union. The same, basic distinction applies equally to *Universal Insulation Corp.* v. *N. L. R. B.*, 361 F. 2d 406 (C. A. 6, 1966), wherein the Court of Appeals decision in this case is cited.

The majority decision of the Court of Appeals in the instant case is derived from the dictum of the NLRB in *Retail Associates, Inc.*, 120 NLRB, 388. *Retail Associates, Inc.*, was a representation case in which the union sought individual employer units and the association sought an association-wide unit. The union claimed to represent a majority of the employees of each employer individually and, *a fortiori*, a majority of the employees of the multi-employer unit. Moreover, the Board found, as a matter of fact, that the union had never "abandoned its original objective of seeking association-wide bargaining" and had

"not renounced in good faith its representation rights in the association-wide unit" 120 NLRB at page 393.

The NLRB holding in *Retail Associates, Inc.*, that a representation election should be held in a unit which all parties in their good faith consider appropriate, in no way militates against a holding that there was no unfair labor practice in this case on its very different facts.

Even the general dicta in the *Retail Associates* case, which is the basis for the decision of the majority below, was not meant to apply to this case. The NLRB wrote, at page 395: "Where actual bargaining negotiations based on the existing multi-employer unit have begun, we would not permit, except on mutual consent, *an abandonment of the unit* upon which each side has committed itself to the other, absent unusual circumstances." (Emphasis supplied.)

What the Board sought to avoid in *Retail Associates, Inc.*, was a change in unit where representational rights and status remain the same. Thus, the Board said, in its dictum, that in the absence of unusual circumstances, once bargaining has commenced, a party may not unilaterally, and without the consent of the other, decide to bargain *in a different unit* where the representational status remains the same.

The majority of the Court of Appeals, in following *Retail Associates, Inc.*, supported its decision by writing: "To permit withdrawal after negotiations commence might well lead to a breakdown of the unit. Withdrawal should be restricted to the period before negotiations to assure that it is not used as a bargaining lever" (357 F. 2d 248-249, Appendix B, p. 3b).

This clearly demonstrates that the majority failed to understand the distinction between this case and the case

in which the rule arose. As Judge Lumbard's dissent indicates, withdrawal from the multi-employer unit could not be used as a bargaining lever in this case because the employer had no intention of bargaining at all, in any unit, with an unrepresentative union. And permitting withdrawal from a multi-employer unit of only those employers whose employees are not represented by the union with which the association bargains would lead to a breakdown of the unit only in that very special case where the union did not represent the employees of any of the employers in the association. In that case, we respectfully submit, the unit should fall.

The majority of the Court of Appeals erred in its construction of Section 8(a)(5) of the National Labor Relations Act.

Section 8(a)(5) of the Act (29 USC Section 158(a)(5) reads:

> "It shall be an unfair labor practice for an employer to refuse to bargain collectively with representatives of *his* employees, subject to the provisions of Section 9(a)." (Emphasis added.)

Section 9(a) of the Act (29 USC Section 159(a)) provides exclusivity of representational status for that union selected by a majority of employees in an appropriate unit. An appropriate unit may be a craft unit, a plant unit, an employer wide unit, or a multi-employer unit.

Consequently, an employer may not refuse to bargain with a union on the ground that it does not represent a majority of all of his employees so long as that union

does represent a majority of those of his employees who may be in an appropriate unit. However, no matter what the size of the unit, the union must be the "representative of his employees" before the Act requires an employer to bargain with it.

In this case the majority of the Court of Appeals has placed a novel construction on Section 8(a)(5). It has construed "his employees" to refer to all the employees of all the employers in the multi-employer bargaining unit; not to the employees of the employer who was charged with refusal to bargain.

This construction, which is contrary to the clear meaning of the words, is unsupported by any citation. It is the basis on which the Court found Sheridan to have violated Section 8(a)(5) despite the fact that the union did not represent Sheridan's employees.

The majority of the Court of Appeals erred in making an assumption of fact as to a matter which was in issue where both the Trial Examiner and the National Labor Relations Board specifically and intentionally refrained from making a finding, and when that issue of fact was never presented to, discussed or argued before the Court of Appeals.

The statement of facts in the majority decision contains the following: ". . . the union and association met March 14 and 25. Respondent's [Sheridan's] Secretary-Treasurer, its bargaining official, was present at these meetings." (357 F. 2d 247, Appendix B, p. 1b).

Whether or not any representative of Sheridan was present at the meetings of March 14 and 25 was an issue

of fact specifically left undetermined by both the Trial Examiner and the National Labor Relations Board, both of them having ruled that the finding was unnecessary to their decisions. (R. 4, ftnt. 4; R. 20, ftnt. 5).

This issue of fact was never presented to the Court of Appeals, either in brief or argument. The Court of Appeals showed no interest in this issue during argument. Petitioner can only conclude from the off-hand manner in which the "fact" is set forth in the majority decision of the Court of Appeals that said court did not recognize that it was making a initial determination on a contested issue.

That this "fact" was important to the majority is apparent from its concern with the possibility that withdrawal by any employer once negotiations had begun might disrupt the collective bargaining process, even though no such disruption occurred in this case. At the very least, the case should, therefore, be remanded because of this error.

CONCLUSION

For all the reasons set forth above, a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX A

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519 are as follows:

29 U. S. C. Sec. 152.

When used in this subchapter—

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U. S. C. Sec. 152.

When used in this subchapter—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any

individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U. S. C. Sec. 157.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

29 U. S. C. Sec. 158.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

29 U. S. C. Sec. 158.

(a) It shall be an unfair labor practice for an employer—

(2) to dominate or interfere with the formation or administration of any labor organization or con-

tribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

29 U. S. C. Sec. 158.

(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U. S. C. Sec. 158.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

29 U. S. C. Sec. 159.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and

to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U. S. C. Sec. 159.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

APPENDIX B

Opinion of Court of Appeals

SMITH, *Circuit Judge*:

Respondent Sheridan Creations is engaged in the wholesale distribution of ladies' sweaters and related products in New York, New York. After decision by the trial examiner in favor of respondent, the NLRB found that respondent violated § 8(a)(1) and (5) of the NLRA, 29 U. S. C. 158(a), by refusing to accept and ratify a collective bargaining agreement reached between a union and the Knitwear Employers Association, the multi-employer association to which respondent had belonged. The Board issued a cease and desist order on October 1, 1964, and petitions pursuant to § 10(e) of the Act, 29 U. S. C. 160(e), for enforcement of the order. We hold the order a valid exercise of the Board's power and order its enforcement.

Pursuant to agreement with the union, respondent had joined the association in 1960, after the union had organized respondent's employees. Respondent adopted the existing joint agreement between the union and association, and was a party to agreements of 1960 and 1961. The 1961 agreement was to terminate April 30, 1963, and the union notified respondent and the association, on February 23, 1963, of a wish to negotiate. It was the usual practice for the association to bargain generally and for each member to bargain on particular matters. Respondent did not reply to the union's request, and the union and association met March 14 and 25. Respondent's Secretary-Treasurer, its bargaining official, was present at these meetings. On March 27 respondent filed a petition with the NLRB Regional Director, requesting an election in a single em-

ployer unit, and on April 1 notified the association it was withdrawing bargaining authority effective March 26. Respondent withdrew the petition of March 27, as well as another filed later, and eventually filed a third petition on May 1. After further negotiation the union and association agreed to terms on April 30, and the agreement was ratified and signed by May 8. Respondent refused to ratify and to continue to recognize the union.

Respondent argued before the Board that there was nothing to support the determination of a multi-employer bargaining unit. The Board has been given broad discretion in this area, *NLRB* v. *Truck Drivers Local No. 449* (*Buffalo Linen*), 353 U. S. 87 (1957), especially where the individual units are small. Here the units were small and worked in the same narrow field and the employers had agreed to bargain and had bargained as such a unit. Respondent stressed the right of individual employers to bargain separately on special matters. Sometimes this has resulted in a finding of no multi-employer unit, see *Retail Clerks Union No. 1550* v. *NLRB*, 330 F. 2d 210 (2 Cir. 1964). But "Multi-employer bargaining does not altogether preclude demand for specialized treatment of special problems." *Genesco, Inc.* v. *Joint Council 13, United Shoe Workers of America*, 341 F. 2d 482 (2 Cir. 1965). The Board's determination of the appropriate bargaining unit should not lightly be set aside, *Packard Motor Car. Co.* v. *NLRB*, 330 U. S. 485 (1947). Respondent here indicated by agreeing to three previous agreements that it intended to be bound by the Association's bargaining. We think there was sufficient support for the determination of a multi-employer unit.

The Board's rule, *The Kroger Co.*, 148 NLRB 569 (1964), *Ice Cream Frozen Custard Employees*, 145 NLRB 865

(1964), *C & M Construction Co.*, 147 NLRB 843 (1964), *Walker Electric Co.*, 142 NLRB 1214 (1963), that withdrawal from a multi-employer unit is untimely, absent union consent, once negotiations on a new contract have started, seems to us logical, although it has not yet received approval from the courts. To permit withdrawal after negotiations commence might well lead to a breakdown of the unit. Withdrawal should be restricted to the period before negotiations to assure that it is not used as a bargaining lever. Since this is the purpose of the rule, it is used as an alternative to an inquiry into good faith. In fact, the Board, in reversing the Trial Examiner, held that no issue of good faith was involved. In any event, good faith in a refusal to bargain is no defense to the unfair labor practice charge, *United Aircraft Corp.* v. *NLRB*, 333 F. 2d 819 (2 Cir. 1964); *Welch Scientific Co.* v. *NLRB*, 340 F. 2d 199 (2 Cir. 1965), at least where the Board finds, as it did here, that the multi-employer unit was in fact the appropriate one.

Multi-employer bargaining is based on the consent of the parties to treat with one another through the agreed units. A shift in membership after negotiations have begun has lively possibilities for disrupting the bargaining process. In a case such as this, good faith withdrawal of a small unit might in practice have minimal or no effect. However, the potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun. We cannot say that no such potential exists, or that its incidence would be so infrequent that the Board's judgment that the uniform rule is needed is without a reasonable foundation or arbitrary in nature.

Respondent claimed that since it filed a petition for an election in a single employer unit on May 1, and the agreement between the union and the association was not signed until May 8, the petition was timely. In view of the statutory duty to execute contracts where agreement has been reached (here, on April 30), Sec. 8(d), filing an election petition when under that duty cannot alter it.

When withdrawal is not timely the multi-employer unit is still the unit held "appropriate," Sec. 9(a), for the purpose of collective bargaining.

Respondent argues that it would be illegal for it to bargain after it knew that a majority of *its* employees had withdrawn. *"Its,"* however, refers to the bargaining unit, once one has been established, rather than one employer of a multi-employer unit.

An appropriate order will enter enforcing the order of the Board.

LUMBARD, *Chief Judge* (dissenting):

The sole issue before us is the appropriateness of the Board's rigid rule that withdrawal from a multi-employer bargaining unit, once negotiations have begun, is untimely and ineffective regardless of bad faith or a showing that there has been an adverse effect upon the bargaining process. In my opinion, withdrawal should be permitted at any time in the absence of evidence that it was in bad faith or that it was unfair to any of the other participants in the negotiations.

By their nature multi-employer bargaining units are voluntary and consensual. *NLRB* v. *Sklar*, 316 F. 2d 145 (6 Cir. 1963). Only recently the Board declared: "It is

because the multiemployer unit is rooted in consent that the Board has always permitted an employer to withdraw from such a unit for any reason at a proper time and by giving proper notice. The Board has considered material to permitting withdrawal only the 'time and manner' of the withdrawal request . . . Important practical considerations demonstrate the wisdom of leaving intact the freedom of the parties to form and dissolve, to modify and adapt, multiemployer units." *The Evening News Association*, 154 NLRB No. 121, pp. 4, 8 (1965).

I agree with the Board's view that it must be alert to prevent an employer from gaining the advantages of group bargaining without accepting the burden of being bound by whatever decision the group arrives at, and to protect a party which bargains in reliance upon the composition of the unit. To that end it is well settled that the intention of a party to withdraw from a multi-employer bargaining unit must be unequivocal and exercised at an appropriate time. E.g., *NLRB* v. *Jeffries Banknote Co.*, 281 F. 2d 893 (9 Cir. 1960); *The Kroger Co.*, 148 NLRB No. 69 (1964); *Walker Electric Co.*, 142 NLRB 1214 (1963).

But it does not follow and certainly it is not "well-settled," as the Board stated in its opinion in this case, that withdrawal after negotiations have begun is per se untimely. The only case relied upon by the Board, *Kroger Co., supra*, did not state such a flat rule; cited no authority for such a rule; and was decided on the basis of a very careful factual discussion. Nor was *Walker Electric Co.*, decided solely on the basis of an untimely withdrawal. "But even more important than the timing aspect," the opinion noted, "is the secrecy and want of good faith." 142 NLRB 1214, 1221 (1963). The only prior cases which

purported to follow the rule adopted in this case were *Retail Associates, Inc.*, 120 NLRB 388 (1958) and *C & M Construction Co.*, 147 NLRB 843 (1964). But in both cases the rule was dictum—in *Retail Associates* the Board found the withdrawal was in bad faith after an extensive factual analysis and in *C & M Construction Co.* the union consented to it.

In my view, we should adhere to the procedure originally established by the Board of inquiring whether the withdrawal was in good faith,[1] and not harmful to the other parties. This is the investigation which it has been able to make in the past and the appropriateness of which it recently reaffirmed: "A careful analysis of precedent reveals that variations in facts and circumstances preclude a *per se* approach, and demonstrates that the ultimate determination with respect to timely withdrawal must turn upon a discriminating evaluation of all attendant facts and circumstances." *Tulsa Sheet Metal Works, Inc.*, 149 NLRB No. 120, p. 16 (1964).[2]

The Hearing Examiner found that the withdrawal of Sheridan from the unit was in good faith and was based

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[1] The majority's insistence that good faith is always irrelevant to a charge of a violation of § 8(a)(1) is misplaced. *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963). As the Supreme Court made clear last term, *NLRB* v. *Brown*, 380 U. S. 278 (1965), the employer's motivation is irrelevant only where the conduct is "demonstratively destructive of employee rights and is not justified by the service of significant or important business ends." The two cases from this circuit cited by the majority are not inconsistent with that view.

[2] This case-by-case approach to problems in the field of multi-employer bargaining has some court approval. *Retail Clerks Union No. 1550* v. *NLRB*, 330 F. 2d 210 (D. C. Cir. 1964).

on the desire of a majority of its four employees not to be represented by the union. When the employees informed respondent in December that three of them wished to leave the union an officer of the Knitwear Association informed Sheridan that it could not withdraw at that time because of the existing union contract. After negotiations began the employees reminded Sheridan of their desire not to remain in the union and shortly thereafter it filed a representation petition and attempted to withdraw from the Association. The union has not claimed during any of the proceedings that it had a majority in Sheridan's unit nor suggested that the loss was the result of any unfair practice.

The withdrawal here was not a bargaining stratagem or the result of dissatisfaction with the course of the negotiations. Cf. *Universal Insulation Corp.*, 149 NLRB No. 124 (1964); *Tulsa Sheet Metal Works, supra.* The withdrawal does not appear to have prejudiced the union in any manner in its bargaining tactics—there were three negotiating sessions in the month following the withdrawal. Compare *Walker Electric Co., supra,* where the president of the respondent continued to participate in the negotiations after his "withdrawal" and *Detroit Window Cleaners Union,* 126 NLRB 63 (1960) where the union did not know of the purported withdrawal until after the contract was completed.

Because the record is so clear on this matter I do not think that a remand is necessary to determine whether the union suffered any disadvantage from the withdrawal even though the issue was not considered either by the Board, which thought a flat rule should be applied, or by the Hearing Examiner, who was concerned solely with the issue of good faith on the part of the employer.

Neither potential instability of the bargaining process nor administrative convenience requires substituting a flat rule prohibiting withdrawal after negotiations have begun in place of an inquiry as to bad faith and possible harmful effects. When the possible disruption of the bargaining process occurs the Board has been fully able to correct the abuse. Administrative convenience, desirable as it surely is, cannot justify introduction of a rigid rule in these circumstances. See, *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 198 (1941).

Not only does the Board's proposed rule put an unnecessary limitation upon the voluntary nature of multi-employer units but it conflicts with the policy so forcefully expressed in *International Ladies' Garment Workers Union* v. *NLRB*, 366 U. S. 731 (1961) that an employer should not bargain with a non-representative union. If an employer has not withdrawn from a multi-employer bargaining unit, and if such a unit is appropriate, it may be proper to allow or even require him to bargain with a union which has a majority in the overall unit but not among his employees. But the policy of not permitting an employer to bargain with a union which does not represent the choice of his employees furnishes strong reason for allowing withdrawal from the multi-employer unit in the absence of any showing of actual harm to the collective bargaining process or lack of good faith.

The rule approved by the majority is unnecessary, and this case amply demonstrates its unsoundness. There being no evidence of bad faith by the employer or any harmful effect of its withdrawal from the voluntarily formed unit, I would deny enforcement.

Decree of Court of Appeals

Before: Lumbard, Chief Judge, Smith, Circuit Judge and Levet, District Judge.*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, its officers, agents, successors, and assigns on October 1, 1964. The Court heard argument of respective counsel on October 25, 1965, and has considered the briefs and transcript of record filed in this cause. On March 16, 1966, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the respondent pay over to the complaining union all dues to which said union would have been entitled had respondent become party to the agreement dated May 1, 1963 between the said union and the Knitwear Employers Association, Inc., and it is further ordered, adjudged and decreed that the respondent pay to each of its employees, over and above the compensation already paid to them during the term of the said agreement, any additional compensation, if there be any, to which said employees would have been entitled under said agreement. It is further ordered, adjudged and decreed that the respondent fulfill all other obligations of any kind which respondent would have had if it had become a party to the said

* Sitting by designation.

agreement and which are continuing, effective, and unsatisfied as of the date of this order.

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United States Circuit Judge

J. JOSEPH SMITH
United States Circuit Judge

RICHARD H. LEVET
United States District Judge

June 8, 1966.

For the reasons stated in his dissenting opinion, Judge Lumbard dissents from the entry of this order.